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CHARLES ELMORE

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1934.

No. 344.

ATLANTIC COAST LINE RAILROAD COMPANY,
Appellant,

vs.

STATE OF FLORIDA and E. S. MATTHEWS, MAMIE EATON-GREENE and W. B. DOUGLASS, ETC., *et al.*,
Appellees.

No. 345.

STATE OF FLORIDA and E. S. MATTHEWS, MAMIE EATON-GREENE and W. B. DOUGLASS, ETC., *et al.*,
Cross-Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, *et al.*,
Cross-Appellees.

PETITION FOR REHEARING.

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Attorney General of the State of Florida.

THEO. T. TURNBULL,
Special Counsel, Florida Railroad Commission.

HENRY P. ADAIR,
AUGUST G. GUTHEIM,
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Counsel for Brooks-Scanlon Corporation, Wilson Cypress Company, and Cummer Cypress Company, as Cross-Appellants.

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Of Counsel:
JOHN W. DAVIS.

THE GALLOU PRESS NEW YORK

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PETITION FOR RE-HEARING.

Come now the State of Florida and E. S. Matthews, W. B. Douglass and J. C. Carter, as and constituting the Florida Railroad Commission, Brooks-Scanlon Corporation, Wilson Cypress Company and Cummer Cypress Company, and Wilson Lumber Company of Florida, Appellees and Cross-Appellants in the above entitled cause, jointly and severally, and pray that this Court do set aside the decision rendered herein by this Court and do grant a re-hearing of this cause, upon the following grounds severally.

Introductory Statement.

The Scope of the Opinions and Their Assumptions.

The Matters Upon Which the Majority and Minority Opinions Coincide.

As we see it, the majority and minority opinions of the Court coincide in the following particulars:

That the Cummer scale during the restitution period was a lawful state rate, having the force and effect of a State statute;

That the rate exacted by the Railroad Company during the restitution period was exacted solely by virtue of the unlawful order of the Interstate Commerce Commission and the erroneous decree of the District Court which sustained it;

That the void order of the Commission ought to have been set aside by the District Court in the first instance;

That the power conferred by Congress on the Interstate Commerce Commission to fix intrastate rates is limited to prospective action only; that power has not been granted to the Commission to give reparation for the past; and that what was done in this case must be considered in the light of that established rule.

The Assumptions Upon Which the Majority Opinion Turned.

The minority held that the Cummer scale being the only lawful rate under Florida law, the claimants were entitled, as a matter of right, to restitution measured by the Cummer scale, that measure being conclusive upon the parties and the Court under the Federal Constitution and Federal and State law. The majority held, however, that the right of the claimants to restitution measured by the Cummer scale was *prima facie* only and might be defeated by equitable defenses asserted by the Railroad Company. It found that the proceedings before the Interstate Commerce Commission demonstrated that the defect in the void order was a defect of form, a mere "slip of procedure", and held that the carrier should

not be made to pay the price of "blunders" of the Commerce Board. In so holding, the majority assumed that there was evidence before the Federal Commission at the time when the void order was made upon which the Commission might then have made the basic and essential findings declared by this Court on the former appeal to have been fatally lacking, and assumed (at least by implication) that in the proceedings resulting in the void order, the Railroad Company invoked the Federal power and desired or proposed to discontinue the Cummer scale and sought to displace it with one to be prescribed by the Federal Commission.

With deference we say that these assumptions are unwarranted and that the conclusions drawn from them result in retroactively validating an order of the Commission neither supported by evidence nor by findings, thus ratifying the wrong which was done in the first instance through the misuse of Federal power which occurred when the unlawful order was entered and sustained by the erroneous decree of the District Court.

These things we undertake to demonstrate in the following pages.

1. The Opinion of the Court Assumes Throughout that the Claims of Florida and of the Claimants are founded upon a Procedural Slip and an Imperfection of Form in the Order of the Interstate Commerce Commission which was stricken down by this Court upon the Former Appeal, Whereas in Fact that Order was Void not only for Lack of Basic and Essential Findings, but Because there was a Total Lack of Revenue Evidence Before the Commission to Support Such Finding.

The primary assumption of the court on this appeal seemingly was that the only defect in the Interstate Commerce Commission order of August 2, 1928, was one of form that was

subsequently cured. This is apparent from the following language of the court:

> "Thereafter the order was adjudged void by a decision of this court (citing cases), but void solely upon the ground *that the facts supporting the conclusion were not embodied in the findings.* * * *
>
> "By the time that the claim for restitution had been heard by the master and passed upon by the reviewing court, the Commission had cured the defects in the *form* of its earlier decision. During the years affected by the claim there existed in very truth the unjust discrimination against interstate commerce that the earlier decision had attempted to correct. If the processes of the law had been instantaneous or adequate, the attempt at correction would not have missed the mark. It was foiled through *imperfections of form*, through *slips of procedure*, * * * as the sequel of events has shown them to be" (pp. 6 and 7 of opinion). (Italics ours.)

Implicit in this statement is the assumption that there was evidence in the record before the Commission on which it might have made the "basic or essential" findings for the lack of which this Court held the Commission order of August 2, 1928 void on the former appeal (282 U. S. 194). Even assuming that the court could regard the want of "basic or essential" findings as rendering the order merely voidable and not void (cf. *United States, et al.* v. *Baltimore & Ohio R. Co.*, 293 U. S. 454 decided January 7, 1935, referring specifically to the former appeal in this case), we respectfully submit that there can be no doubt that the court would be compelled to regard a want of substantial evidence to support the necessary findings as rendering the order absolutely void, hence incapable of being cured by subsequent action of the Commission (*Chicago R. I. & P. R. Co.* v. *United States*, 274 U. S. 29, 33). To allow an order not supported by substantial evidence to be retroactively cured would be nothing short of a denial of due process of law, as this court has often held.

(a) THERE WAS NO EVIDENCE BEFORE THE INTERSTATE COMMERCE COMMISSION WHEN THE VOID ORDER WAS MADE TO SUPPORT THE BASIC AND ESSENTIAL FINDINGS.

The petitioners submit that an examination of the evidence before the Commission in the original proceeding will show that there was no substantial evidence to support the needed findings, hence that the order of August 2, 1928, could not be cured by what happened at the reopened proceedings before the Commission.

The "basic or essential" and jurisdictional findings for the lack of which this Court upon the former appeal struck down the order of the Commission were set forth by this Court with particularity in the concluding portions of its opinion (282 U. S. 214-215):

> "The Commission made no findings as to the revenue which had been derived by the carrier from the traffic in question, or which could reasonably be expected under the increased rates, or that the alteration of the intrastate rates would produce, or was likely to produce, additional income necessary to prevent an undue burden upon the carrier's interstate revenues and to maintain an adequate transportation service."

The record in the original proceedings before the Commission (including all of the evidence) upon which the void order of the Commission was entered is part of the record on this appeal (former Records, Vols. I and II). That record contains no evidence to support a single one of the basic and essential findings thus declared by this Court to be lacking in the Commission's report. There was no evidence at all with respect to the revenues of the carrier except an exhibit introduced by the Georgia Public Service Commission showing the gross *system* operating revenue and the net *system* operating revenues of the carrier from 1914 (the year when the Cummer Scale was made generally applicable in Florida) to 1925, inclusive (Former Record 396). The per mile increase of 1925 over 1914 was shown by that evidence to be 155.2% with

respect to gross earnings, and 159.8% with respect to net earnings. *That exhibit was introduced to show that "there was no real financial necessity for increased rates."* (Former Record 704).

The only cost evidence in the record consists of two cost studies with respect to the trainload movement of Brooks-Scanlon Corporation from Carbur, Florida, and Perry, Florida, to Eastport, Florida (Exhibits 25 and 39-40, Former Record, 294-307 and 369-377), the one introduced by the carrier and the other by the Florida Commission. *Both show that the Cummer Scale as applied to that movement was compensatory and remunerative.* Both were considered, condemned and discarded by the Interstate Commerce Commission in its report (Former Record, 23), and by this Court (282 U. S. text 213) for the reason that they dealt with trainload movements as distinguished from single carload movements and were based on "arbitrary assumptions".

The balance of the evidence which was before the Commission relates wholly to the issue of discrimination against persons and localities, an issue eliminated by the District Court in the first instance and abandoned by the Commission and the carrier. It is analyzed and discussed under Point IV of our brief entitled, "Brief of Appellees and Cross-Appellants on Reargument", at pages 90 *et sequiter.*

The order was therefore void not only for the lack of basic and essential findings called for by this Court upon the former appeal, but also for the more fundamental reason that there was no substantial evidence to support such findings or order when the void order was entered.

(b) REVENUE EVIDENCE WAS LACKING IN THE ORIGINAL PROCEEDINGS RESULTING IN THE VOID ORDER, BECAUSE THE ATLANTIC COAST LINE DEFENDED THE CUMMER SCALE AS APPLIED TO INTRASTATE COMMERCE IN FLORIDA. THOSE PROCEEDINGS WERE ESSENTIALLY PROCEEDINGS INVOLVING PERSONS AND LOCALITIES (AT LEAST AS FAR AS THE RAILROAD COMPANY WAS CONCERNED) CONFINED BY THE EVIDENCE TO NORTH FLORIDA, AND THIS COURT HAS SO HELD.

In the original proceedings before the Interstate Commerce Commission resulting in the void order, the Railroad Company, which was the sole defendant, by its answer denied that there was any violation on its part of the Interstate Commerce Act, and prayed to be dismissed (Former Record 200). The Railroad Company did not contend that the Cummer Scale, as applied to intrastate commerce in Florida, was noncompensatory, nor did it present any evidence to show that that was so.

The Railroad Company's freight traffic manager declined to state that he did not consider that the Cummer Scale as then applicable in Florida, produced a fair and reasonable profit above the cost of operation (Former Record 491).

The Interstate Commerce Commission in the report upon which the void order was entered found as a fact that the Railroad Company proposed to continue the Cummer Scale throughout Florida, if permitted to do so, until the Carpenter-O'Brien timber should have been transported (Former Record 21). The transportation of that timber could not have been completed until about 1939, long after the restitution period (R. 869-870).

The primary purpose of the Georgia Public Service Commission in the complaint which initiated the original proceeding resulting in the void order was to extend the application of the Cummer Scale into interstate commerce from Florida to Georgia (Former Record 417-19). As declared by this Court in a subsequent decision the original proceeding was "essentially one of undue prejudice against shippers con-

fined by the evidence to rates prevailing in northern Florida" (United States vs. Louisiana, 290 U. S. 70). It was not, as the Court upon this appeal declared, a proceeding "directed to the maintenance of the Cummer Scale" (Opinion, p. 2). Hence, the revenue evidence that such a proceeding would have called for was not produced.

(c) THE LACK OF EVIDENCE NECESSARY TO SUPPORT THE FINDINGS WAS RECOGNIZED BY THE INTERSTATE COMMERCE COMMISSION ITSELF AFTER THE COMING DOWN OF THE OPINION AND DECISION OF THIS COURT UPON THE FORMER APPEAL.

After the coming down of the mandates (and not before) the Railroad Company filed a petition before the Interstate Commerce Commission praying that that Commission prescribe just, reasonable and non-discriminatory rates for the transportation of logs in intrastate commerce in Florida. (Brief of Appellees and Cross-Appellants on Reargument, pp. 31, 32.)

The Interstate Commerce Commission made no attempt to make findings upon the record and evidence in the original proceedings. On the contrary, it reopened those proceedings and took much additional evidence. It made no further findings until July 5, 1932. In its new findings then made it did not attempt upon the former record to justify the void order entered upon that record. Its new findings of fact and conclusions of law (186 I. C. C. text 187-190, Exhibits, pp. 201-204) show upon their face that they are founded on the evidence taken in the new, and not in the original, proceeding. Those findings and that order speak *in presenti*, and *in futuro*, and not retrospectively. The Federal Commission thus recognized that the former record and evidence would not support "the basic and essential" findings, for the lack of which this Court struck down its former order. This action by that Commission constitutes an administrative construction of its own records which should be controlling in this Court irrespective of the matters hereinbefore set forth.

2. Due Process of Law Forbids the Use of the New Evidence which was Before the Commission in the Reopened Proceedings to Supply the Deficiency in the Evidence on which the Order of August 2, 1928, was Based.

The Court in its opinion on this appeal said in part (Opinion, p. 7):

> "The Commission was without power to give reparation for the injustice of the past, but was not without power to inquire whether injustice had been done and to make report accordingly. Indeed, without such an inquiry, *and appropriate evidence* and findings, its order could not stand, though directed to the years to come" (Italics ours),

thus recognizing that there must be evidence to support the findings as well as findings to support an order of the Commission prospective in its nature. Yet in the concluding portion of the same paragraph of the opinion (p. 7), the Court declares:

> "What it (the Commission) had stated in its first report (146 I. C. C. 717) was thus supplemented and confirmed by what it stated in the second. The two sets of findings tell us, when read together, that restitution is without support in equity and conscience, whatever support may come to it from procedural entanglements."

It is thereby apparent that the Court gave effect to the evidence in the reopened proceeding before the Commission to supply the deficiency in the evidence in the original proceeding.

The petitioners respectfully submit that there are two conclusive reasons why this action of the Court was in disregard of due process of law. First, the evidence in the reopened proceeding was not before the Court.

As we pointed out in our brief on Reargument (pp. 82 to 87, incl.), the record made and evidence taken in the re-

opened proceedings of the Commission resulting in its valid order of July 5, 1932, was not before the District Court or before this Court in this appeal. Nor was there an identity of parties, of subject-matter or of relief sought. Hence in the inquiry at bar the proceedings before, and findings of, the Commission in the reopened proceedings should have no effect, evidentiary or otherwise (Brief on Reargument, pp. 74-75 and 82 to 87, incl., and 116).

Secondly, since it is settled law that the Commission may not supplement the evidence before it by papers or records in its files, or before it in other proceedings (*Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 227 U. S. 88; *United States* v. *Abilene & S. R. Co.*, 265 U. S. 274, 287-288), surely this Court will not supplement and supply the evidence before the Commission upon which the void order was made with evidence adduced more than two years and findings made more than four years after the void order was entered. We respectfully submit that so to do would be to exercise for the Commission powers not conferred upon it by the Congress and which the Commission in this case did not assume itself to exercise, and would be contrary to the constitutional guaranties of the citizen with respect to due process and appropriate hearing, as well as contrary to the constitutional rights of the State.

3. Even if by the Doctrine of Relation the Findings and Evidence Supporting the Valid Order of July 5, 1932, Could be Related Back to the Void Order of August 2, 1928, Such Evidence and Findings Would not Support the Void Order of August 2, 1928.

(a) Conditions Existing Prior to August 2, 1928, were not in Evidence in the Reopened Proceeding.

In the reopened proceedings which resulted in the valid order of July 5, 1932, the Commission did not make any investigation or findings with respect to "the revenue which

had been derived by the carrier from the traffic in question" prior to the entry and effective date of the void order. The claimants demanded that the Railroad Company produce evidence of the revenues which had been derived from the traffic in question during the three years next preceding the effective date of the void order. The Railroad Company refused. The claimants then moved the Commission itself to require the Railroad Company to furnish that data. The Commission refused to require it to be done (4 F. Supp. 477, 480). It made no findings with respect to the movement or the revenue during the period antedating the void order. In so acting we must assume that the Commission considered that any order it might make would apply only to the future and that what had taken place prior to the entry of the void order was of no consequence. We must assume also that the District Court and this Court felt likewise when they sustained the order of the Commission of July 5, 1932.

Therefore the doctrine of relation would avail the Railroad Company nothing here, even if it were available to the Commission or to this Court in this sort of proceeding under any circumstances.

(b) CONDITIONS EXISTING SUBSEQUENT TO THE ORDER OF AUGUST 2, 1928, WERE, AS A VERY CONSEQUENCE OF THAT ORDER, DIFFERENT FROM THE CONDITIONS EXISTING PRIOR TO THAT DATE.

In referring to the order of July 5, 1932, as curing the defects in the order of August 2, 1928, this Court, in its opinion (p. 10) had this to say:

> "The Court surveys the years and discerns the same injustice, dominant at the beginning as well as at the end. Indeed, nowhere in the record is there a suggestion on the part of any one that during this long litigation there has been any change of conditions whereby a discrimination against interstate commerce illegitimate at one time would be innocent at another. What

was injustice at the date of the second order of the Commission is shown beyond a doubt to have been injustice also at the first."

The inaccuracy of this statement is demonstrated by the fact that the claimants showed that as the direct and proximate result of the void order and of the refusal of the District Court to set it aside, prosperous mill towns had been destroyed and mills and property having an aggregate value of millions of dollars had been dismantled and junked (Original Brief of Cross-Appellants, pp. 61-66). They showed that all this had resulted in cutting off a large volume of log shipments moving at low cost in trainloads on regular schedules (Original Brief of Cross-Appellants, pp. 61-66); that the total traffic in pine logs (the principal logs manufactured in Florida) was approximately one-half of one per cent. of the former volume which moved to three trainload shippers alone in the period preceding the entry of the order and that the traffic in other logs was rapidly diminishing (Original Brief of Cross-Appellants, p. 62, and 186 I. C. C. 171).

When the void order was entered, neither the mills nor the traffic had been destroyed. The cost studies and evidence produced by the State and the shippers in these restitution proceedings was to the effect that up to that time the log traffic as a whole in Florida, moving as it did in large volume and largely upon regular schedules in trainload quantities, was compensatory and remunerative (Original Brief of Cross-Appellants, pp. 75-105).

Hence the circumstances and conditions surrounding the traffic at the time when the valid order was entered on July 5, 1932, were so different from the circumstances and conditions existing when the void order was entered August 2, 1928, that the evidence and findings necessary to support the prospective order entered in 1932 were not appropriate to support the order entered in 1928.

4. The Order of this Court Upon the Former Appeal Denying the Motion of the Railroad Company to stay the Mandates and the Effect and Operation of the Mandates is Conclusive of the Right to Restitution.

The decision of this Court reversing the District Court's opinion was rendered January 5, 1931. The Railroad Company, on January 23, 1931, before the coming down of the Mandate, moved this Court to stay the mandate in the District Court or, in the alternative, to include in the direction to the District Court instructions to maintain the status quo until the Commission should have an opportunity to reopen its proceedings and take further action. The Railroad Company, by its motion, represented that it was to the interest of justice that the status fixed by the Commission's (void) order which had been effective from February 8, 1929, be maintained *until the Commission had again considered the record in the light of this Court's opinion. It asserted that otherwise demands for substantial reparations might be asserted against it, with the result that great injury might be done the Railroad Company for which there would be no relief,* a large number of logs having moved under the rate prescribed by the (void) order. In support of its motion the Railroad Company cited *Smith* v. *Illinois Bell Telephone Co.*, 282 U. S. 133, and other cases of like import. The State and the shippers filed a memorandum in opposition to the motion citing *Board of Railroad Commissioners of North Dakota* v. *Great Northern R. Co.*, 281 U. S. 412.

This Court on January 26, 1931, entered its order denying the motions of the Railroad Company. We respectfully submit that the denial of the motion in this Court was a contemporaneous construction by this Court of its own opinion and decision to the effect that no further action of the Commission could give life or vigor to the void order which this Court, by its mandates sent down a few days later, ordered set aside.

These restitution proceedings are actions upon those mandates. We respectfully submit that the denial by this Court of those motions of the Railroad Company was a decision upon the merits, is the law of the case, and was binding upon the parties, upon the District Court and upon this Court.

5. The Refusal to Grant Restitution Gives An Effect to the Interstate Commerce Act to Restrict State Sovereignty Which Was Never Intended by Congress.

The decision of the Court gives validity to an order of the Interstate Commerce Commission which invaded the domain of the State by altering lawful State rates, which order was not supported by "basic or essential" findings or by any evidence upon which those findings could be made, and which order was diligently attacked by the State and its citizens in the only forum where such order could be lawfully attacked. The opinion of the Court now determines that unjust discrimination existed at the time of the making of the void order, and declares the defects in the order to have been cured in effect. Yet the Act itself only permits the making of such order *after* the evidence is taken and a full hearing had and then only the prescription of the rate *thereafter* to be charged.

If such an order can be thereafter cured by subsequently applying jurisdictional findings and evidence, the result of an attack upon an order of the Interstate Commerce Commission must be forever in doubt, even when this Court has spoken condemning the order as was the case here. It was declared in the case of *Board of Railroad Commissioners of the State of North Dakota* vs. *Great Northern Railway Company*, 281 U. S. 412, that the Congress had never intended to interdict a lawful State rate until *after* appropriate action by the Interstate Commerce Commission. The Court on this appeal has apparently overlooked the fact that the Interstate Commerce Act is not self-executing, and has as a consequence of its oversight sanctioned a limitation of State sovereignty in violation of the Tenth Amendment to the Constitution.

6. Even Assuming That Restitution Were a Matter of Grace Instead of a Matter of Right, the Conduct of the Railroad Company in the Original Proceedings before the Commission, and the Record in this Cause, Furnished Equitable as Well as Legal Grounds Requiring that Restitution be Awarded.

Despite the fact that in our opinion the decisions of this Court hold in terms that restitution is a matter of *right* and that the granting thereof is the *duty of every court*[8], we nevertheless point out some considerations raising an equitable duty on the part of the District Court to restore what was lost by its erroneous decree.

We have shown that the Railroad Company voluntarily maintained the Cummer Scale for nearly 25 years applicable to trainloads and nearly 15 years applicable to both trainloads and carloads, resulting in the making of large investments based upon faith in its continuance. We have shown that in and throughout the original proceedings resulting in the void order, the Railroad Company defended the Cummer Scale for intrastate application in Florida, and that the Commission, in the report on which the void order was based, found as a fact that the Railroad Company proposed to continue the Cummer Scale throughout Florida if permitted so to do until the Carpenter-O'Brien timber should have been transported (Former R. 21), a term which would have extended far beyond the restitution period (R. 869-870).

It was not denied at the Bar or in the briefs of our adversary, the Railroad Company, on this appeal that if the District Court had entered the right decree in the first instance, the Cummer Scale would have continued to be the rate charged until further administrative or judicial remedies had been invoked. This Court in the opinion on this appeal declares:

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[8] *Baltimore & O. R. Co. v. United States*, 279 U. S., text 785.
Ex parte Lincoln Gas & Electric Co., 256 U. S. 512, and 257 U. S. 6.
Northwestern Fuel Co. v. Brock, 139 U. S. 216.

> "If the processes of the law had been instantaneous or adequate, the attempt at correction would not have missed the mark" (Opinion, Page 7).

If that principle is applied to the erroneous decree of the District Court the void order would never have been enforced. And if the proposal by the Railroad Company to continue the Cummer Scale throughout Florida, if permitted so to do, were made in good faith (Commission Report, Former R. 21), there is no reason to assume that any rate other than the Cummer Scale would have been applied in Florida during the restitution period.

7. The Circumstances and Conditions Under Which the Logs of Certain of the Claimants Moved Warrant Separate Consideration of their Claims if the Principles Announced in this Court's Opinion Are to Stand.

If equitable principles are to prevail, at least three of the claimants, viz., Brooks-Scanlon Corporation, Cummer Cypress Company and Wilson Cypress Company, who filed separate motions for restitution, are entitled to have their claims considered on the specific facts involved. The Interstate Commerce Commission itself recognized, in publishing its order of July 5, 1932, that under certain states of facts the scale established by it might be unreasonable, for it provided in its order that:

> "Our findings herein and in our prior report on further hearing are without prejudice to the right of the authorities of the State of Florida or of any other interested party to apply in the proper manner for a modification of our findings and order as to any specified intrastate rate on the ground that it is not related to interstate rates in such a way as to contravene the provisions of the interstate commerce act."

And this Court, when considering that report and order of the Commission (292 U. S. 1, text 13) and upholding it,

pointed out that the report of the Commission had contained this reservation and thought it of sufficient importance to quote it in full in its opinion.

If the fact finding body itself stands prepared to review its findings in situations involving special facts, this Court in an equity proceeding should certainly not hold the general findings of that body conclusive where such special facts are involved.

Looking at the special facts surrounding the claims of the three claimants named it is clear beyond a doubt that restitution is due to them.

The cars of logs out of which arose the claims of Brooks-Scanlon Corporation all moved from Perry and Carbur to Eastport. Those included in the Cummer Cypress Company claim moved from Homosassa to Lacoochee. Those included in the Wilson Cypress Company claim all moved from Hines to Palatka. All of those logs moved in trainload quantities upon regular schedules.

The evidence discloses that where the movement is heavy and the cost low between particular points of origin and particular destinations, it is quite the usual thing for point-to-point rates to be established between such origins and destinations substantially lower than those prevailing between origins and destinations where the movement is less regular and less dense. We have pointed out that the difference in the rate level under such circumstances was not an unjust discrimination, but a just discrimination, citing numerous authorities to that effect (Brief of Appellees and Cross-Appellants on Re-Argument, p. 66).

The Master found that between destinations and points of origin where the movement was so heavy as to warrant transportation in solid trainloads, the cost was lower than that between other points of origin and other destinations (R. 197-198). His report assembles the evidence with respect to the movement between Hines and Palatka and finds the cost (so-called), including 5¾% return upon investment and a

proportionate part of the taxes, to be (R. 211-212, 218-219) as follows:

Atlantic Coast Line Railroad's Cost Estimate, per car	$27.18
Interstate Commerce Commission's Cost Estimate, per car	27.52
Saunders' (Claimants') Higher Cost Estimate, per car	21.38
Saunders' (Claimants') Lower Cost Estimate, per car	18.31

The revenue per car based on the Hines to Palatka movement was as follows (R. 212):

At the scale actually paid under the Void Order and Erroneous Decree	$41.60 per car
At the Cummer Scale	20.48 per car

We feel that this cost evidence conclusively reveals the right of these particular claimants to restitution. But the Master refused to utilize the evidence, because of a failure to recognize the difference between a just discrimination and an unjust discrimination between persons and localities (R. 196-198). And the District Court confirmed him in it (R. 352). In this Court the point was made and discussed at length. The claimants saved the point, assigned error upon it and both at the Bar and in the Briefs (Original Brief of Cross-Appellants, pp. 48-142) made extensive argument upon the subject. Upon this aspect of the case the Court made no comment or decision.

8. The Court Failed to Recognise that Both the Master and the District Court had Found that the Schedule Set up by the Void Order of the Interstate Commerce Commission was Unreasonable.

This Court, in its opinion (p. 11), said:

> "The claimants do not sustain the burden that is theirs by showing that the Master set up a reasonable schedule. They must show that the other schedule, the one set up by the Commission, is unreasonable. In the absence of such a showing the carrier does not offend against equity and conscience in standing on its possession and keeping what it got."

We lay aside for the moment the fact that the carrier got what it keeps through the erroneous failure of a Federal District Court to restrain the unlawful invasion of state domain though a sovereign member of the Union and the citizens of that State and of the nation had invoked the process of that Court in the manner prescribed by the laws of Congress, and with deference we point out that both the Master and the District Court found that the schedule "set up by the Commission, is unreasonable." The Master found in terms (R. 192, 193):

> "The burden is upon the claimants to show that they were not just and reasonable charges and were extortionate and oppressive, and upon their failure to do so they would not be entitled to any recovery."

And he further found in terms (R. 220):

> "The Master finds that the charges made by the Atlantic Coast Line Railroad Company for shipments by claimants of logs over the railroads of the Atlantic Coast Line Railroad Company in Florida, from February 8, 1929, to March 5, 1931, were not proper or lawful charges but were higher than proper or lawful charges and that the total principal amount that claimants should recover

from the defendant, the Atlantic Coast Line Railroad Company, as and for overcharges on said shipments during said time shall be $99,941.77, which is 34% of the total or aggregate principal amount claimed by the claimants against the Atlantic Coast Line Railroad Company on account thereof during said period."

The District Court confirmed the findings of the Master and at the very conclusion of its opinion (R. 354) declared:

> "The just compensation as fixed by the master, applicable of course only to these past transactions, affords reimbursement for all fair elements of cost and a fair profit. His figure approximates the intrastate rates on logs in Georgia and North Carolina, and is some lower than that in Alabama and South Carolina. We think the master's conclusion is just and we affirm it" (R. 354).

These findings by the Master and confirmation by the Court are based upon 778 pages of evidence (summarized into narrative form) and 307 exhibits. That evidence is summarized on pages 98 to 116, inclusive, of the Brief of Appellees and Cross-Appellants on Re-Argument. The findings of the Master and those of the District Court confirming it are findings of *fact*. We conscientiously assert that not only did the voluminous record sustain the conclusion of the Master "that the other schedule, the one set up by the Commission, is unreasonable", but that by the time the evidence before the Master had been closed, practically every railroad in the Southern Group, save the Atlantic Coast Line and a few others, had displaced the Commission's schedule applicable to nearly all milling points in Southern Territory, with scales of rates found by the Interstate Commerce Commission to be substantially on the level with the Cummer Scale.

CONCLUSION

Wherefore these appellees and cross-appellants, severally, upon the several grounds above stated, do pray that this

Court set aside the said decision so rendered by it and do grant a rehearing of said cause.

Respectfully submitted,

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Counsel for Brooks-Scanlon Corporation, Wilson Cypress Company, and Cummer Cypress Company, as Cross-Appellants.

J. V. NORMAN,
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Of Counsel:
JOHN W. DAVIS.

Certificate of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1934.

ATLANTIC COAST LINE RAILROAD COMPANY, Appellant, vs. STATE OF FLORIDA and E. S. MATTHEWS, MAMIE EATON-GREENE and W. B. DOUGLASS, ETC., *et al.*, Appellees.	No. 344.
STATE OF FLORIDA and E. S. MATTHEWS, MAMIE EATON-GREENE and W. B. DOUGLASS, ETC., *et al.*, vs. THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, *et al.*, Cross-Appellees.	No. 345.

I, C. G. ASHBY, of counsel in the above entitled cause, do hereby certify that the attached and foregoing Petition for Re-Hearing is presented in good faith and not for delay.

C. G. ASHBY.